Ridgewell's, Inc. ***and*** **Hotel & Restaurant Employees Union, Local 25, AFL–CIO.** Case 5–CA–27800

May 18, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On June 26, 2000, Administrative Law Judge Jerry M. Hermele issued the attached decision. Both the Respondent and the General Counsel filed exceptions, supporting briefs, and answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified and set forth in full below.

In exceptions, the General Counsel argues that the judge erred in failing to find that Respondent violated Section 8(a)(5) of the Act by discontinuing fringe benefit contributions for employees after it took over the afternoon and evening catering functions at the United States House of Representatives in January 1998 from the predecessor contractor. In essence, the General Counsel contends that the Respondent was not free, as a successor employer, to establish initial terms and conditions of employment without first bargaining with the Union.[4] For the reasons set forth below, we reject the General Counsel's contention, and affirm the judge's dismissal of this allegation.

Under *NLRB v. Burns Security Services*, 406 U.S. 272, 294–295 (1972), a successor employer is generally free to establish initial terms and conditions of employment without bargaining, except where it is "perfectly clear" that the employer will retain the employees under their prior conditions. See *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975). In *Spruce Up*, the Board held that a successor employer meets the "perfectly clear" exception if it "actively or, by tacit inference" misleads employees into believing at the time of hiring that employment conditions will not change, or if it "failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." 209 NLRB at 195. Here, however, the Respondent contends that its announcement of the intent to employ the predecessor's employees as independent contractors was both timely, coming before operations or hiring began in January 1998, and substantive, putting the Union on notice that a new set of employment conditions would be in effect. We agree with the Respondent.[5]

The Respondent met with the Union on January 9, 1998. During that meeting, the Respondent's president, Thomas Keon, announced that it would utilize the previous catering employees on an independent contractor basis. At that time, the Respondent had not yet begun operations at the House of Representatives, and actually had not yet finalized its subcontract with the primary contractor, GSI.

We find that Keon's announcement, made prior to hiring or finalization of the catering subcontract, clearly signaled that the Respondent's initial terms and conditions of employment would differ from those in the Union's previous collective-bargaining agreement with the prior contractor. The testimony of Minor Christian, president of Local 32 before its merger with Local 25, supports this view. Christian acknowledged that it was "always the position of the company" that the workers had to be independent contractors, and he indicated his understanding that such an arrangement would differ from past employment practice with the predecessor.

Our adoption of the judge's finding that the predecessor's employees continued to work for Ridgewell's as employees within the meaning of the Act, rather than as independent contractors, does not alter the fact that Keon's announcement portended employment under different terms and conditions. Since the Respondent an-

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In finding the Respondent to be a successor, Member Hurtgen notes that the Respondent focuses primarily on the assertion that the predecessor employees were changed into independent contractors. Member Hurtgen rejects that contention.

[4] References to "the Union" in this decision encompass both Hotel and Restaurant Employees Union Local 32 and its successor, Local 25.

[5] Although the judge correctly found that the Respondent is a *Burns* successor and violated Sec. 8(a)(5) by refusing to bargain with the Union, he did not directly address the "perfectly clear" issue in dismissing the additional allegation that the Respondent failed to continue making fringe benefit contributions. As discussed infra, however, based on our review of the record we find that the Respondent made clear from the outset of its negotiations to take over the catering contract that it did not intend to operate under the same terms and conditions of employment as the predecessor. We note that the General Counsel does not contend that the Respondent's plan to use the predecessor's employees as independent contractors was an unlawful attempt to avoid having to recognize and bargain with the Union.

nounced its clear intention before any hiring, it is not a "perfectly clear" successor under *Burns* and *Spruce Up*. Consequently, the Respondent did not violate the Act in January 1998 by establishing initial terms and conditions of employment without first bargaining with the Union. These terms did not include continuation of fringe benefit payments made under the predecessor employer's collective-bargaining agreement.

The judge further found, however, that the Respondent made certain unilateral changes subsequent to its commencement of operations. These changes, announced on July 21, 1998,[6] and implemented on August 1 by the Respondent without bargaining with the Union did violate Section 8(a)(5) and are to be remedied as set forth in the judge's recommended Order, as modified here.[7]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Ridgewell's Inc., Bethesda, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified and set forth in full below.

1. Cease and desist from

(a) Refusing to recognize and bargain collectively with the Hotel & Restaurant Employees Union, Local 25, AFL–CIO (the Union), as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All regular full-time and regular part-time employees and regularly scheduled catering employees at the House of Representatives system, excluding students, casual employees, office clerical employees, guards, watchpersons, professional employees, management trainees, and supervisors as defined in the Act.

(b) Unilaterally changing wages, hours, and other terms and conditions of employment of the employees in the above-described bargaining unit without first notifying and bargaining with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively with the Union, as the exclusive representative of employees in the above-described unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed contract.

(b) Rescind, on request by the Union, changes unilaterally made in the terms and conditions of employment of employees in the above-described unit on August 1, 1998.

(c) Make bargaining unit employees whole, with interest, for any monetary losses suffered as the result of the Respondent's unlawful unilateral changes.

(d) Within 14 days after service by the Region, post at its facilities in Bethesda, Maryland, and at the U.S. House of Representatives in Washington, D.C., copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 15, 1998.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[6] See GC Exh. 16.

[7] We shall modify the recommended Order to accord with the traditional Board format and to include specific cease-and-desist provisions for the Respondent's unlawful conduct. In addition, we shall provide that the Respondent make unit employees whole for any monetary losses they may have suffered from the Respondent's unlawful unilateral changes, in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain with the Hotel & Restaurant Employees Union, Local 25, AFL–CIO as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All regular full-time and regular part-time employees and regularly scheduled catering employees at the House of Representatives system, excluding students, casual employees, office clerical employees, guards, watchpersons, professional employees, management trainees, and supervisors as defined in the Act.

WE WILL NOT unilaterally change wages, hours, and other terms and conditions of employment of our employees in the above-described bargaining unit without first notifying and bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL recognize and, on request, bargain collectively with the Union, as the exclusive representative of our employees in the above-described unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed contract.

WE WILL rescind, on request by the Union, changes unilaterally made in the terms and conditions of employment of our employees in the above-described unit on August 1, 1998.

WE WILL make our employees whole, with interest, for any monetary losses suffered as the result of our unlawful unilateral changes.

RIDGEWELL'S, INC.

Elicia Marsh and *Eileen Conway, Esqs.,* Baltimore, Maryland, for the General Counsel.
Celeste M. Wasielewski and *Marnie W. Zebreck, Esqs. (Verner, Liipert, Bernhard, McPherson & Hand)***,** Washington, D.C., for the Respondent.

DECISION[1]

I. INTRODUCTION

JERRY M. HERMELE**,** Administrative Law Judge. Since 1998, Ridgewell's, Inc. (Ridgewell's), has assuaged the afternoon and evening hunger and thirst of the United States House of Representatives by catering events at the U.S. Capitol. In a December 22, 1999 complaint, the General Counsel alleged that Ridgewell's has violated Section 8(a)(1) and (5) of the National Labor Relations Act since 1998 by refusing to bargain with the Hotel & Restaurant Employees Union, Local 25, AFL–CIO, and its predecessor, Food & Beverage Workers Union, Local 32, AFL–CIO, which represent catering and cafeteria workers.[2] Ridgewell's primary defense is that the caterers are independent contractors and thus are not covered by the Act.

This case was tried on April 6, 2000 in Washington, D.C.,[3] during which the General Counsel called three witnesses and the Respondent called two witnesses. Then, both parties filed briefs on May 11, 2000.

II. FINDINGS OF FACT

The U.S. House of Representatives in Washington, D.C. occupies the U.S. Capitol, the Rayburn Building, the Longworth Building and the Cannon Building, all of which have at least one cafeteria, coffee shop or snack bar. Special events which are catered are also held elsewhere in these buildings. In 1987, the Union organized the cafeteria workers and caterers, which was at about the same time Congress privatized the food service operation for the U.S. House. Bids were solicited and Service America was awarded the contract, with which the Union negotiated a contract. However, three years later Congress took back control of the House's food service operation. That changed again in 1994 when Marriott Corporate Services/Thompson Hospitality L.P. (Marriott) was awarded the contract. And the Union negotiated a collective-bargaining agreement with Marriott as well, which ran until December 31, 1997 (G.C. Ex. 5; Tr. 49–50, 53). Guest Services, Inc. (GSI), a Fairfax, Virginia company, succeeded Marriott on January 15, 1998 (Tr. 5, 68–69, 75–76). GSI only wanted the cafeteria operation, however, which consisted of about 130 employees. GSI then reached a collective-bargaining agreement with the Union (G.C. Ex. 7). The catering operation, which consisted of 30 workers, was then subcontracted out by GSI to two other companies: UCW, Inc. (Uptown Catering) and Ridgewell's, a

[1] Upon any publication of this Decision by the National Labor Relations Board, changes may have been made by the Board's Executive Secretary to the original Decision of the Presiding Judge.

[2] The General Counsel's original August 26, 1999 complaint and December 22, 1999 amended complaint alleged other violations of the Act which were settled on March 17, 2000, with the withdrawal of the underlying charge in Case 5–CA–28329 (G.C. Ex. 1(0)).

[3] Tr. 1 is hereby corrected to reflect the trial location.

Bethesda, Maryland business which provides services exceeding $50,000 yearly outside of Maryland and Washington, D.C. (G.C. Ex. 1(L); Tr. 52, 77, 84–85). Ridgewell's agreed to cater House events after 2 p.m., such as dinners and cocktail receptions. Ridgewell's typically prepares its food in Bethesda, which is then eaten at various events in the Washington, D.C. area, including private homes, foreign embassies, and the White House (Tr. 228, 240–41).

On January 10, 1998, Local 32 reached a collective-bargaining agreement with Uptown, which catered morning and lunchtime events at the U.S. House (G.C. Ex. 8; Tr. 161). Uptown had previously worked with Marriott, utilizing the Union's cafeteria workers to prepare the food used for catering on the House premises (Tr. 85–86). Local 32's President, Minor Christian, asked Ridgewell's to bargain as well in early January 1998. On January 15, 1998, Ridgewell's President, Thomas Keon, wrote to Christian saying that he was "willing to bargain in good faith" but that could not "enter into any further discussions with you" until Ridgewell's contract with GSI was finalized (G.C. Ex. 9; Tr. 44, 96–99, 107, 140, 239). In the meantime, Keon wanted to use the Union's workers to staff various events at the House. And the Union agreed to provide 30 waiters, bartenders and carvers from existing "A" and "B" lists (G.C. Exs. 11–12; Tr. 101–06, 141–42, 242–44). Those on the "A" list received various benefits under Marriott's contract, but those on the "B" list did not (Tr. 65–67). According to Keon, he discussed the possibility of using these workers permanently as independent contractors in early January, and Christian stated that this arrangement "may work." But Christian denied ever saying any such thing (R. Ex. 5; Tr. 247, 266–67). Upon learning that Ridgewell's reached final agreement with GSI, Christian called Keon in February. But Keon said that Ridgewell's would continue to prepare the food in Bethesda and would use the Union's people only as independent contractors, as it so used other workers at other venues in the Washington area (G.C. Ex. 13; Tr. 99–100, 108–09, 240). But the Union was concerned that, as independent contractors, the workers would be unable to collect unemployment benefits during the five-to-six months a year when they were not working because of Congressional recesses (Tr. 116, 158–59). Christian told the workers that the Union would not accept Ridgewell's offer that they work as independent contractors (Tr. 146). And on April 17, Christian requested in writing that Keon bargain, but Keon responded on April 20 that these workers were not Ridgewell's employees (G.C. Exs. 14–15). So, Christian filed an unfair labor practice charge against Ridgewell's on June 29, 1998 (G.C. Ex. 1–I; Tr. 112).

On May 1, 1998, Local 32 was absorbed into Local 25. Before the merger, Local 25 had over 5000 members in the Washington, D.C. area. By contrast, Local 32 had about 1700 members in the Washington area and throughout the Commonwealth of Virginia (G.C. Ex. 4; Tr. 18–19, 32–33). Two or three weeks before the merger, notices were mailed to the last known addresses of each member of both locals, in English and Spanish, announcing that the Executive Boards of Local 25 and Local 32 had voted to merge (G.C. Ex. 2, pp. 2–5; Tr. 17, 31–32). The rank-and-file of Local 25 met on April 15, at a regularly scheduled meeting in a church, and voted via paper ballots in the church pews, 157 to 4, to approve the merger (G.C. Ex. 2, p. 1; Tr. 34). Notices of the meeting were posted before April 15 in various locations where Local 25 members worked (Tr. 31). Local 32 members voted on April 18, 23, 27 and 30, in Richmond, Washington, Norfolk, and Williamsburg, respectively. These votes also approved the merger as follows:

Richmond	26–0
Washington	178–51
Norfolk	12–1
Williamsburg	43–0

(G.C. Ex. 2, p. 1)

Since early 1998, the Union's wait staff has continued to work for Ridgewell's afternoon events at the House (Tr. 249–53). Most of this staff have worked catered events at the House for many years, and many are at least 60 years old (Tr. 54, 66). Many of these workers would also perform breakfast and lunch events for Uptown and then work afternoon and evening events for Ridgewell's. For example, a waiter or bartender would wear his own tuxedo for the whole day and use his own bartending tools for both employers (Tr. 164, 188–89, 194–96). Ridgewell's used some union "A" and "B" list caterers at House events not covered by its contract with GSI, and sometimes used nonunion workers at GSI House events when it needed more people than the "A" and "B" lists would provide (R. Ex. 4; Tr. 135–36, 222–27, 254, 258).

On July 21, Keon informed Christian that pay rates, gratuity practice, and seniority would be maintained from the Marriott contract. But he added that each catering staff member would be required to complete a Form W-9 for tax purposes, sign "acknowledgement of Ridgewells rules and regulation of conduct," and undergo orientation. Also, Ridgewell's would schedule the catering staff itself (G.C. Ex. 16). But in a July 29, 1998 letter, Christian reiterated his demand that Ridgewell's "negotiate over the broad range of issues found under the general heading of wages, hours and working conditions" (G.C. Ex. 17). But Ridgewell's did not respond. Instead, on August 1, it implemented various changes. The catering staff would call Ridgewell's on Fridays to receive their assignments for the following week (Tr. 166–67). Although Ridgewell's conducted a general orientation program for the workers, attendance was not compulsory (Tr. 209–10). Ridgewell's paid the workers every two weeks, either by mail or in person at Bethesda. By contrast, Uptown and Marriott paid the workers at the House (Tr. 186–87). If a worker went to Bethesda, he would not have access to the lunch room or locker room there, which were reserved for hourly or salaried employees (Tr. 197, 221). But no worker was required to come to Bethesda (Tr. 200). No worker would wear a Ridgewell's logo on his tuxedo (Tr. 214). A worker could decline to work a House event (Tr. 221). Further, Ridgewell's did not evaluate a worker's performance, although one Ridgewell's supervisor would be present at each House event (Tr. 180, 220–21, 242). That supervisor could issue discipline for tardiness or a rules violation (Tr. 260). Indeed, two workers were not used again by Ridgewell's after May 26, 1998 when they were caught taking equipment or food from a House event (G.C. Ex. 21). Thereafter, each worker received written company "service standards" (G.C. Ex. 20).

And the workers all received Form 1099 tax forms for 1998 and 1999 (R. Exs. 2–3). In that connection, Ridgewell's paid no benefits and no deductions were made from compensation (Tr. 187–88, 216, 218, 250). Finally, Ridgewell's carried insurance for the workers (Tr. 232).

III. ANALYSIS

A. The Section 8(a)(5) Allegations

The General Counsel alleges that since January 1998 Ridgewell's has violated its statutory duty to bargain with the Union over the terms and conditions of employment of the wait staff working afternoon and evening events at the U.S. House. Ridgewell's offers four defenses to the alleged violation of Section 8(a)(5) of the Act: (a) the wait staff are independent contractors, which are specifically exempted from the Act's coverage by Section 2(3); (b) Ridgewell's operation is significantly different from the predecessor employer's (Marriott) business, thus exempting it from any duty to bargain; (c) the Union's tardy bargaining demand estops it from asserting any bargaining obligation against Ridgewell's; and (d) the merger between Locals 25 and 32 in May 1998 was invalid, thus relieving the Respondent of any duty to bargain with the surviving entity, Local 25. As discussed infra, however, the Presiding Judge rejects all of these defenses.

Following the expiration of an old employer's collective-bargaining agreement, a successor employer must bargain with the incumbent union if the new employer's operation is similar to the old employer's and if the new employer hires a majority of the existing bargaining unit. *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *J. P. Mascaro & Sons*, 313 NLRB 385 (1993). Ridgewell's first defense is that there is a major difference between the Marriott wait staff and the Ridgewell's wait staff because the former were "employees" and the latter are "independent contractors." But this simplistic argument ignores the fact that Ridgewell's has used the vast majority of the approximately 30-member Marriott wait staff from January 1998 to the present. Further, Ridgewell's unilateral labeling of this wait staff as independent contractors does not make them so. Rather, the wait staff possesses most of the well-established indicia of employee status. For example, Ridgewell's schedules the House catering events and the wait staff's hours at these events. It also posts a supervisor at each event. Although the experienced staff is not closely supervised, it is significant that the Ridgewell's supervisor possesses, and uses, the ultimate disciplinary power of termination. To be sure, there are some indicia of independent contractor status, such as the wait staff's use of their own bartending tools, wearing their own tuxedos lacking a Ridgewell's logo, and their ability to work other House events. And Ridgewell's treats them different from their own employees by issuing Tax Form 1099s to the wait staff and generally isolating them from the Bethesda-based employees. But the wait staff used their own tools and non-logoed tuxedos for Marriott and Uptown, which both treated them as employees. And the evidence shows very little outside work by the wait staff, which is kept very busy by Ridgewell's and Uptown when Congress is in session, and is drawing unemployment compensation when Congress is away. In sum, the indicia of independent contractor status are minor when compared to the aforementioned factors establishing that the wait staff have "no significant entrepreneurial opportunity" for gain or loss. *NLRB v. United Insurance Co*., 390 U.S. 254 (1968); *Roadway Package System, Inc.*, 326 NLRB 842 (1998). Compare *Dial-A-Mattress Operating Corp*., 326 NLRB 884 (1998) (owner-operator truck drivers hire their own employees and form their own companies, showing independent contractor status). Therefore, it is concluded that since 1998 Ridgewell's continued to use substantially the same wait staff employees in catering events at the House.

Ridgewell's second defense is that there is no substantial continuity of Marriott's pre-1998 business because Ridgewell's only caters afternoon and evening House events, bringing in the food from Bethesda. By contrast, Marriott provided day-long cafeteria service on the House premises in addition to operating the catering service. But it is well-settled that a successor employer is still required to bargain even if only "a mere portion of the predecessor's operation" has been acquired. *Tree-Free Fiber Co.*, 328 NLRB 389 (1999); *Phoenix Pipe & Tube Co.*, 302 NLRB 122 (1991). Further, the business of Marriott and Ridgewell's is essentially the same, the House wait staff performs exactly the same jobs in the same working conditions for both employers, and both employers have the same customer base: the House of Representatives. Thus, it is concluded that there is substantial continuity between the Marriott and Ridgewell operations. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987). And because there is also substantial continuity of employees, as discussed supra, it is further concluded that Ridgewell's is a successor employer, subject to the duty to bargain with the Union, within the meaning of *Burns*.

Ridgewell's third defense is that the Union is estopped from claiming its right to bargain because it waited until April 1998 to make a bargaining demand, which was three months after Ridgewell's assumed the House afternoon/evening catering operation and used the wait staff therewith. The Presiding Judge, however, accepts the credible testimony of Minor Christian, Local 32's President, that he orally requested bargaining in an early January 1998 meeting with Ridgewell's President Thomas Keon. Although the Respondent maintains that it always told the Union that the wait staff had to be independent contractors, it is significant that at trial Keon did not refute Christian's testimony. Also, Keon wrote to Christian on January 15, 1998 that he was "willing to bargain in good faith" as soon as Ridgewell's finalized its subcontract with GSI. While Christian made the wait staff available to Ridgewell's starting in January 1998, it is also clear that he never accepted Keon's position that the wait staff were independent contractors. Indeed, Keon merely testified that Christian said that the independent contractor issue "may" work, notwithstanding Christian's denial of even conceding this possibility. More importantly though, Christian made a written bargaining demand in April 1998 and, when that yielded no result, he filed an unfair labor practice charge in June 1998. Thus, the Respondent is wrong in contending that the Union "led the Company to reasonably believe the independent contractor matter was acceptable to the Union." Accordingly, there is no equitable argument saving Ridgewell's from its duty to bargain with the Union.

Finally, Ridgewell's questions the validity of the May 1, 1998 Local 32-Local 25 merger in an attempt to avoid its bargaining obligation. At the outset, Ridgewell's sudden concern with the merger is ironic because of its lack of any timely protests in 1998. Nevertheless, its recent objections are irrelevant concerning Local 32's timely bargaining demands from January to April 1998, which Ridgewell's simply ignored by claiming the wait staff were all independent contractors. As for claiming that it had no duty to bargain with the merged entity, Local 25, after May 1, 1998, internal union matters such as mergers are generally not a subject for government oversight unless: (a) the members were not afforded due process in voting on the merger; or (b) the merged entity does not provide substantial continuity of representation for the old union's members. *NLRB v. Financial Institution Employees*, 475 U.S. 192 (1986). And the Respondent has the burden to prove either of these negative factors. *May Department Stores Co.*, 289 NLRB 661 (1988).

Regarding the due process factor, the Board focuses on whether the members received adequate notice of the vote, whether there was adequate opportunity for discussion before the vote, and whether the vote was conducted by secret ballot. *May*, supra at 665. Further, as Ridgewell's recognizes, the Board is mainly concerned with protecting the smaller union's procedural rights, which in this case was Local 32. See *Amalgamated Industrial & Service Workers Local 6 (X-L Plastics)*, 324 NLRB 647, 650 (1997). But the evidence clearly shows that notices of the proposed merger were mailed to all the known addresses of Local 32 members two or three weeks before the vote. Also, the 1700 or so members voted 259–52, in four separate meetings throughout Virginia and Washington, D.C., in favor of the merger. While the record is silent on the opportunity for discussion before the four votes, or whether the votes were held by secret ballot, Ridgewell's faults the General Counsel for failing to examine at trial Local 32's President Minor Christian about these matters and, further, requests that an adverse inference be drawn regarding this failure. However, such an inference is unwarranted because Ridgewell's has the burden of proof on this issue and still failed to call any witnesses on its own to prove any lack of due process regarding the merger vote. See *Southern Container, Inc.*, 330 NLRB 400 (1999). Further, the fact that only 18% of Local 32 members voted on the merger question does not raise an inference of a due process violation. *Central Washington Hospital*, 303 NLRB 404, 414 (1991). Therefore, in the absence of any proof of egregious violation, it cannot be concluded that the merger vote was invalid. See *News/Sun Sentinel Co.*, 290 NLRB 1171, 1175 (1988).

As for whether the merger was "sufficiently dramatic" to alter Local 32's identity," *NLRB v. Financial Institution Employees*, 475 U.S. 192, 206 (1986), the Presiding Judge concludes that the May 1, 1998 merger adequately protected the smaller union. Minor Christian, Local 32's President, retained a prominent role in Local 25 and there is no evidence of any onerous control of the old entity after the merger vote. Indeed, Local 32 was originally part of Local 25 before declaring its independence around 1988 and then deciding to reunite in 1998 (G.C. Ex. 2). In short, Ridgewell's duty to bargain with Local 32 continued with Local 25.

B. Other Matters

At trial, we left open the matter of the admissibiity of General Counsel Exhibit 6, which is a list of "A" and "B" wait staff workers as of late 1997 or early 1998, which is the time period between Marriott's operation and GSI's operation. The list is remarkably similar to a list of workers provided by Christian to Keon in early 1998. The two lists show a continuity of the workforce into Ridgewell's tenure. Accordingly, General Counsel Exhibit 6 is relevant and will be received.

Next, on May 11, 2000, Ridgewell's filed a motion to correct the transcript at 14 places. The General Counsel objected to one of those proposed corrections changing a date at page 209 from December 1998 to September 1998. The Presiding Judge finds the change irrelevant but nevertheless also finds no basis for the proposed change. Thus, the motion to correct the transcript will be granted as to the 13 changes only.

IV. CONCLUSIONS OF LAW

1. The Respondent, Ridgewell's, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Unions, Hotel & Restaurant Employees Union, Local 25, AFL–CIO, and Food and Beverage Workers Union Local 32, AFL–CIO, are labor organization within the meaning of Section 2(5) of the Act.

3. As alleged in paragraphs 12 and 18 of the General Counsel's complaint, the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with Local 32 from January 1998 to May 1, 1998, and by refusing to bargain with Local 25 after May 1, 1998.

4. The Respondent violated Section 8(a)(1) and (5) by unilaterally making changes, not specified in the complaint, to the terms and conditions of employment of the wait staff after January 1998.[4]

5. The unfair labor practices of the Respondent, set forth in paragraph 3 and 4, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

[4] Because the General Counsel introduced no evidence regarding the alleged failure of the Respondent to make contributions to the fringe benefit funds specified in the Local 32–Marriott contract, this aspect of paragraph 13 of the complaint must be dismissed.